

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF MICHIGAN
4 SOUTHERN DIVISION

5
6 **UNITED STATES OF AMERICA,**

7 Government ,

8 **HONORABLE GEORGE CARAM STEEH**

9 v.

10 **No. 15-20652**

11 **D-3 EUGENE FISHER,
D-4 COREY BAILEY,
D-6 ROBERT BROWN,
D-13 ARLANDIS SHY,
D-19 KEITHON PORTER,**

12 Defendants .

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 /
14 **JURY TRIAL**

15 **Monday, August 13, 2018**

16 - - -

17 **APPEARANCES:**

18 For the Government :

19 JULIE FINOCCHIARO, ESQ.
20 JUSTIN WECHSLER, ESQ.
21 TARE WIGOD, ESQ.
22 MARK BILKOVIC, ESQ.
23 Assistant U.S. Attorneys

24 For the Defendants :

25 HENRY M. SCHARG, ESQ.
On behalf of Eugene Fisher

CRAIG DALY, ESQ.
KEITH SPIELFOGEL, ESQ.
On behalf of Corey Bailey

JAMES FEINBERG, ESQ.
On behalf of Robert Brown

MARK MAGIDSON, ESQ.
JOHN THEIS, ESQ.
On behalf of Arlandis Shy

1
2 STEVEN SCHARG, ESQ.
3 On behalf of Keithon Porter
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6

7 *To Obtain Certified Transcript, Contact:*
8 *Ronald A. DiBartolomeo, Official Court Reporter*
Theodore Levin United States Courthouse
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9 *Proceedings recorded by mechanical stenography.*
10 *Transcript produced by computer-aided transcription.*

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I N D E X

2 _____ Page _____
3 Jury instruction conference 4

• The *lateral* view shows the side profile of the head.

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For more information about the study, please contact Dr. Michael J. Hwang at (310) 206-6500 or via email at mhwang@ucla.edu.

16 Identification Offered Received

18 N O N E

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The following table summarizes the results of the study.

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1 Detroit, Michigan
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5 Monday, August 13, 2018

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7 (Proceedings held without defendants and jury.)

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10 THE COURT: So the Court has been presented
11 the proposed jury instructions in the case with two issues
12 that were given to the Court to decide.

13 I have to say that I think you did a wonderful job
14 in developing the instructions to be delivered to the
15 jury. Much as difficult and as complex as it could have
been, I think you have made the -- structured the
instructions in a way that is relatively simple, and
understandable for the jury address.

16 Addressing the two matters that you were not able
17 to conclude, the defendants object to instructions
18 relating to the sentencing enhancement questions that are
19 given to the jury, and specifically to the instructions
20 that direct the jury to consider whether the defendant or
21 a conspirator attempted to -- to kill, for example, at
22 Page 32 of the current version of the instructions.
23 Actually, it would involve the question of whether first
24 degree premeditated murder was a -- and the elements of
25 that would apply to the defendant or a conspirator caused

1 by the death of another person in light of the elements
2 are based upon Michigan law, and the defense argument was
3 that the Michigan law would require the jury to conclude
4 attribution of the acts to the defendant only, not to the
5 defendant or a conspirator as set forth in the proposed
6 instructions to the jury.

7 The Court agreed with the arguments by the
8 government that this statement of the elements of the
9 offense constitute the identifying the scope and reach of
10 the agreement that the conspiracy that is alleged to be --
11 to have been committed, and it could be a third person
12 altogether, or other members of the conspiracy involved,
13 but it is not an act that needs to be tied to the
14 defendant in any case, and to eliminate the language or
15 the conspirator in that instruction would mislead the jury
16 to believe they are required to tie the acts -- the act of
17 commission of the first degree murder to the main
18 defendant involved in this enhancement alone.

19 So I'm sure you want to articulate the same
20 arguments better than what the Court just did.

21 **MR. WIGOD:** I think the Court stated the
22 government's argument properly, that given that it is a
23 RICO conspiracy, I think it's not required that a
24 particular defendant committed the underlying racketeering
25 act. So the instruction should include the defendant or a

1 conspirator. If it were to state that if a defendant
2 caused -- in this case, for example, premeditated
3 murder -- if it were to state the defendant caused the
4 death, I think that would confuse the jury and is not an
5 accurate statement of what's required in the RICO
6 conspiracy.

7 **THE COURT:** I know Mr. Daly, you can restate
8 your argument much better than I did.

9 **MR. DALY:** Yes.

10 **THE COURT:** Yes?

11 **MR. DALY:** Yes, like I'm agreeing with what
12 you just said. Yes, I acknowledge I should go forward
13 next.

14 We specifically object the phrase or a conspirator
15 because the government has charged the RICO conspiracy,
16 and in the elements of the RICO conspiracy, they layout
17 what the jury has to find, which is a conspiracy or
18 agreement between a defendant and a conspirator, but
19 they've charged specific subjective crimes, and they
20 picked first degree premeditated murder in one of the
21 racketeering activity, and they don't correctly state
22 Michigan law. Michigan law does not allow a conviction
23 for first degree premeditated murder if the defendant or a
24 conspirator committed any of the elements that are listed
25 in the proposed instruction.

1 If you read the first paragraph of racketeering
2 activity, it clearly tells the jury, racketeering activity
3 applied in the RICO statute includes specific types of
4 crimes under state or federal law.

5 So then they go onto instruct the jury about
6 Michigan law by misleading the jury that it includes or a
7 conspirator, and the next sentence, Count 1 of the
8 indictment, alleges that the defendant agreed that the
9 specific crime of racketeering activity, the following
10 types committed.

11 So the jury is told that there's an agreement to
12 commit these substantive crimes, but then allows the jury
13 to convict the defendant even though the elements of first
14 degree premeditated murder is with regards with the
15 individual defendant. It's the or a conspirator phrase
16 that we object to, Judge.

17 **THE COURT:** Yes. And again, I look at this
18 as a summary description of the four elements that
19 represent the elements required to be proven, but to
20 render one guilty of premeditated murder, and the
21 reference to defendant or a conspirator causing the death
22 is an accurate statement of the liability in light of the
23 fact that we're looking at the agreement -- of the
24 agreement represented in this conspiracy, which would not
25 require success in the commission of the murder, or

1 require the defendant alone to be responsible for the
2 offense.

3 **MR. DALY:** But the same language that we're
4 talking about shows up in the other racketeering activity,
5 robbery, witness intimidation.

6 I just want to point out that when it comes to
7 controlled substances, they charge both the substantive
8 and the conspiracy racketeering. That's what I'm talking
9 about.

10 So it you read through all of these other
11 racketeering activities, it actually distinguishes between
12 a substantive offense and a conspiracy. So that just
13 furthers my argument. Sorry to interrupt you.

14 **THE COURT:** That's fine. Okay. So I think
15 we've staked out our positions on that subject.

16 And then the second issue, also objected by
17 defense counsel, was with respect to the verdict form, and
18 again, these are in connection with the sentencing
19 enhancement questions posed, which are broken out
20 defendant by defendant.

21 And the first of those enhancement questions
22 reads: Did defendant, between July 14, 2014 through
23 September 26, 2015, agree that he or another conspirator
24 assault rival gang members with the intent to commit
25 murder, yes or no.

1 And the second question: Did defendant commit, or
2 cause to be committed, or aid and abet in the commission
3 of the attempted murder, in paren, assault with intent to
4 murder of Derrick Peterson, Darnell Canady or Jason Gaskin
5 on or about May 10, 2015.

6 The objection made by defense counsel is that the
7 period of -- by mentioning only the period of the
8 conspiracy without identifying the specific dates of
9 assaults on rival gang members is too ambiguous to
10 effectively address by the defense, that sort of a due
11 process argument, I suppose, although I don't think it was
12 identified as such by Mr. Scharg who was arguing the case.

13 The Court ended up agreeing with the government as
14 it relates to this issue, given the fact that we're
15 talking about a conspiracy, and the unlawful agreement
16 that is at the heart of the conspiracy is certainly
17 clearly identified in the proofs of the case that has been
18 presented through the witnesses thus far, and the jury
19 needs only to find one instance -- I guess I should say
20 that actually, as it's -- I'm trying to recall the
21 government's response to the argument. Mr. Wigod?

22 **MR. WIGOD:** Judge, it is our position that
23 what's in the indictment adequately gives the defendant
24 notice of what the enhancement involves. It states what
25 the statute violation is. It states that they are

1 conspiring. It states when they are conspiring, the date
2 range. It explains the object of the conspiracy, and who
3 they are trying to assault.

4 So it is rather narrow in the time frame that they
5 are going to commit an assault or conspiring to commit an
6 assault, and who the committed the assault against, and as
7 you mentioned, that notice is -- has to be viewed in
8 context of what the proofs were at trial. We're not going
9 to argue anything that was not established at trial.

10 This is a conspiracy. So identifying the specific
11 date and time when the conspiracy started is not necessary
12 in these circumstances. So I think it provides more than
13 adequate notice of what the situation is when you review
14 the context of what the proofs were during the trial.

15 **THE COURT:** Okay. Again -- well, I'll hear
16 Mr. Scharg.

17 **MR. H. SCHARG:** I just want to say that the
18 Court has summarized, you know, my argument which really
19 falls under the due process argument.

20 The only thing that I would like to add is that in
21 the indictment, specifically the sixth superseding
22 indictment, it doesn't give notice -- you know, there's no
23 overt acts in reference to the specific acts that the
24 government alleges would fall in the category of the
25 enhancement, meaning that there's no reference in the

1 overt acts as to Mr. Fisher's video regarding dropping an
2 opp or the reference to going hunting.

3 So of all the overt acts, there were over 100 of
4 them, none of those overt acts in Count 1 address those
5 acts that they are using for the enhancement. So it's a
6 due process argument, and I believe it was not properly
7 notified as to those acts in the defendant's case.

8 **THE COURT:** Okay. So again, this is similar
9 to the only other issue that was presented to the Court
10 for a decision, in that the enhancement is going to be
11 considered by the jury in the summary form that it is --
12 that is identified in presenting these two issues for a
13 decision, because we do have named individuals who were
14 identified as the objects of the attempted murder, and we
15 have a summary description to the defendant or another
16 conspirator to assault rival gang members with the intent
17 to commit murder.

18 It's apparent from the body of the evidence in the
19 case that these are the issues that we're dealing with,
20 and I don't think anything more than a description that is
21 made in these two questions to be presented to the jury is
22 sufficient, and the defendants have enjoyed a sufficient
23 opportunity to identify and to defend the evidence
24 presented in the case that the government is relying on in
25 the presentation of its arguments to the jury.

1 So it is a question for the parties to deal with
2 in the argument, and I think sufficiently identify to
3 protect the rights of the defendant to understand what
4 they're charged with.

5 So the Court is going to again side with the
6 government as it relates to those enhancement questions.

7 Anything else on the subject?

8 **MR. H. SCHARG:** I apologize. I can't get
9 pacer in the room here, but there's some reference --

10 **THE COURT:** Keep your voice up, Henry.

11 **MR. H. SCHARG:** There's a reference in the
12 prior trial that there were separate verdicts forms for
13 each of them, was that true?

14 **THE COURT:** Yes.

15 **MR. H. SCHARG:** My question is if there were
16 separate verdict forms in that case, why do we not have
17 separate verdict forms for the defendants in this case?

18 **THE COURT:** The short answer is there are a
19 lot of other things that are different about the form in
20 this case, and I think the short answer from the Court's
21 perspective is that this is a -- broken out in a way that
22 is simple and easier to understand by the jury than the
23 first jury verdict form was.

24 And the second answer is that this was something
25 that I assumed you all worked out based on the fact that

1 that's the only issue raised here.

2 **MR. H. SCHARG:** Not necessarily. I mean --

3 **THE COURT:** I mean, we sent you a copy of the
4 verdict form.

5 **MR. WIGOD:** This is the first the government
6 heard of it. I don't how it make a difference.

7 **MR. H. SCHARG:** It's a big difference, even
8 in terms of the optics.

9 **MR. FEINBERG:** It gives the jury a clearer
10 picture of each defendant.

11 **MR. H. SCHARG:** These are separate trials.

12 **MR. WIGOD:** We're not doing individual
13 trials.

14 **MR. DALY:** But you're breaking it up.

15 **MR. WIGOD:** Let me see. I'll take a look at
16 it.

17 **THE COURT:** I'm happy to revert to that form
18 also if you agree on it.

19 I'm going to, given the complexity of the
20 instructions, I'm incline to give each juror a full set of
21 the instructions.

22 **MR. FEINBERG:** We're talking about separate
23 verdict forms for each defendant.

24 **MR. WIGOD:** The Judge is talking about a
25 separate set instructions for each juror.

1 **MR. FEINBERG:** Oh, yes.

2 **THE COURT:** I was going to deliver them a
3 copy to follow as I'm reading. It might enhance their
4 comprehension as well.

5 So the short answer is you're going to take a
6 look at --

7 **MR. WIGOD:** I'll take a look at it. Unless
8 there's a problem, I don't have an issue with it.

9 **THE COURT:** Okay. So we've had other
10 clerical errors and things that you discussed this
11 morning?

12 **MR. WIGOD:** Yes. We had agreed to make some
13 changes. I don't know if they need to go on the record.
14 I'll be sending a new copy over to the defense, and if I
15 missed anything, they will let me know.

16 **THE COURT:** Okay.

17 **MR. SPIELFOGEL:** So far you have made the
18 corrections.

19 **THE COURT:** So if we are going to make all
20 these copies, we need to get going on it this afternoon.

21 **MR. WIGOD:** We won't be reading tomorrow,
22 right? I mean, I'll get it done as soon as I can, but
23 hopefully --

24 **MR. BILKOVIC:** We don't think we'll finish
25 closing until Wednesday.

1 **MR. FEINBERG:** Have we decided a time
2 schedule for tomorrow?

3 **MR. DALY:** We talked about it.

4 **THE COURT:** So I told them to be here by
5 nine.

6 Another question, are we going to wait until all
7 of the defense closings are in before the government
8 responds, or is the government going to want to go
9 defendant by defendant?

10 **MR. SPIELFOGEL:** I've never seen that.

11 **MR. BILKOVIC:** That would be awesome. I will
12 make on blanket rebuttal at the end, but if the Court
13 wants to give me that opportunity --

14 **MR. FEINBERG:** If that's way it is the
15 defendant who is not being responded to by Mark, we can
16 leave the court and the attorneys leave and come back?

17 **THE COURT:** Yeah, right.

18 **MR. BILKOVIC:** It's just going to be one.

19 **MR. THEIS:** How many do you think we'll get
20 done tomorrow?

21 **MR. BILKOVIC:** I don't know how long you guys
22 will be, but I think Julie will be two, two and a half
23 hours. I don't know, Judge, but would you be incline if
24 Julie is an hour in, to give a five minute break?

25 **THE COURT:** Oh, yeah. Of course.

1 **MR. BILKOVIC:** Okay. So depending on how
2 long you guys are going. How long do you plan to give the
3 jury for lunch if going to 12 or 12:30?

4 **THE COURT:** An hour maybe, because we can
5 order the food in for them, so they don't have to leave.

6 **MR. WIGOD:** We'll be done by lunch time.

7 **MR. DALY:** I'm going first and last, and
8 depending how far they are, I may ask for an early lunch
9 or later. We'll see how it goes. I'll be about an hour.

10 **MR. BILKOVIC:** I think it's reasonable that
11 once Julie does her --

12 **MR. DALY:** We'll need break.

13 **MR. THEIS:** Are we going to four?

14 **THE COURT:** Yes.

15 **MR. THEIS:** Three at least.

16 **MR. H. SCHARG:** Can we agree to do the
17 government's closing, and then maybe three defense
18 closings, and -- and the of defense closing on Wednesday,
19 and rebuttal on Wednesday?

20 **THE COURT:** Yeah, that sounds like --

21 **MR. BILKOVIC:** If the Court is okay, that
22 would be great. That would allow us to better time
23 everything, it doesn't rush Julie who goes tomorrow first,
24 then three defense arguments, and then the last two and
25 rebuttal.

1 **MR. MAGIDSON:** Instruction on Wednesday?

2 **THE COURT:** Sure.

3 **MR. FEINBERG:** How long do you think you will
4 be?

5 **MR. BILKOVIC:** Depends on how long you are.

6 **MR. FEINBERG:** How long?

7 **MR. BILKOVIC:** Without knowing, maybe
8 somewhere around an hour.

9 **THE COURT:** Okay. We'll touch base at some
10 point later today and make sure you got the stuff.

11 **MR. FEINBERG:** Thank you for breakfast.

12 **THE COURT:** You're welcome.

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14 (Proceedings concluded.)

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C E R T I F I C A T I O N

I, Ronald A. DiBartolomeo, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

9 I do further certify that the foregoing
10 transcript has been prepared by me or under my direction.

12 s/Ronald A. DiBartolomeo
13 Ronald A. DiBartolomeo, CSR
Official Court Reporter

May 9, 2019
Date